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No. 84-1930

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MONTANA, PETITIONER

v.

DONALD P. HODEL, SECRETARY
OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a regulation promulgated by the Secretary of the Interior in 1978 pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, reasonably allocates the reclamation fees collected from coal mining operations on Indian lands to the Indian tribe having an interest in those lands.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a), as amended by order dated February 6, 1985 (Pet. App. 38a-40a), is reported at 749 F.2d 740. The opinion of the district court (Pet. App. 28a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a-45a) was entered on November 20, 1984, and the petition for rehearing was denied on February 11, 1985 (Pet. App. 41a-42a). By order dated May 6, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and

including June 11, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the allocation of reclamation fees collected pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, from coal mining operations in an area of Montana known as the "ceded strip." That area and the coal underlying it have a unique jurisdictional history.

The ceded strip, which is directly adjacent to the Crow Reservation, was ceded by the Crow Tribe to the United States by the Act of April 27, 1904, ch. 1624, 33 Stat. 352. The land was to be opened for entry by non-Indians, with the Tribe to receive the proceeds from the eventual disposition of the land. *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 163-166 (1920). However, the patents issued to non-Indians for the surface rights in 70,000 acres of coal lands in the ceded strip reserved the rights in the underlying minerals in favor of the United States. *Crow Tribe* v. *Montana*, No. CV-78-110-BLG (D. Mont. Sept. 10, 1985), slip op. 6. This had the effect of retaining those mineral interests for the beneficial interest of the Crow Tribe in the event that they eventually were disposed of to non-Indians under the mining laws or otherwise. Pet. App. 6a; *Crow Tribe* v. *Montana*, 650 F.2d 1104, 1107 (9th Cir. 1981), cert. denied, 459 U.S. 916 (1982).

By the Act of May 19, 1958, 72 Stat. 121, all "vacant and undisposed-of ceded lands" on the Crow Reservation (*i.e.*, undisposed-of lands in the ceded strip) and similar lands on several other Indian reservations were restored to full tribal ownership. The 1958 Act had the effect of preventing disposition of the

affected lands under the public land or mining laws. The United States District Court for the District of Montana has recently held, in conformity with the longstanding position of the Department of the Interior, that the undisposed-of subsurface mineral rights on the ceded strip that had been reserved when the surface was sold to non-Indians are included among the "vacant and undisposed-of ceded lands" that were restored to full tribal ownership by the 1958 Act. See *Crow Tribe* v. *Montana*, *supra*, slip op. 6-11.[1]

2. a. The Surface Mining Control and Reclamation Act was enacted in 1977 for the purpose of regulating current and future mining activities and "to promote the reclamation of mined areas left without adequate reclamation" prior to the Act's effective date of August 3, 1977. The Act provides for a comprehensive and intricate program of regulation of mining activities by the federal and state governments.

However, when it passed the Act, Congress deferred a final decision regarding the regulation of

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[1] The undisposed-of surface lands and subsurface mineral rights in the Crow ceded area had been withdrawn from entry by the Secretary several months after passage of the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, in anticipation of their possible restoration to full tribal ownership pursuant to Section 3 of the IRA, 25 U.S.C. 463. See 54 I.D. 559, 561-563 (1934). However, because the Crow Tribe elected not to accept the provisions of the IRA (see 25 U.S.C. 478), the undisposed-of surface lands and minerals were not actually restored to the Tribe pursuant to the IRA. The 1958 Act was passed for that purpose. See *Crow Tribe* v. *Montana*, *supra*, slip op. 6-7. In the recent *Crow Tribe* decision, the district court held that the State of Montana could apply its severance and other taxes to the extraction of the Tribe's coal on the ceded strip.

mining on "Indian lands." The term "Indian lands" is defined for purposes of the Act to mean "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. 1291(9). The coal in the ceded strip in Montana, which is held in trust by the United States for the Crow Tribe, clearly constitutes "Indian lands" under this definition.

Congress's deferral of a final decision regarding such lands is most clearly manifest in Section 710 of the Act, 30 U.S.C. 1300. Paragraph (a) of that section required the Secretary to "study the question of the regulation of surface mining on Indian lands which will achieve the purpose of [the Act] and recognize the special jurisdictional status of these lands." The Secretary was directed by paragraph (a) to consult with Indian tribes in carrying out this study and to include in his report "proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." The Secretary was further directed by paragraph (h) of the same section to "analyze and make recommendations concerning the jurisdictional status of Indian Lands outside the exterior boundaries of Indian reservations." 30 U.S.C. 1300(h). In the meantime, paragraphs (c) through (f) of Section 710, 30 U.S.C. 1300(c)-(f), provide for the regulation of active mining on "Indian lands." Presumably because of the uncertainty regarding how these questions concerning Indian lands would ultimately be resolved, Section 523(a) of the Act, 30 U.S.C. 1273(a), states that "except as provided in

[30 U.S.C. 1300], the provisions of [the Act] shall not be applicable to Indian lands." To further implement this principle, "Indian lands" are expressly excluded from the definition of the term "lands within any State," which in turn limits the geographic scope of a state's program that the Secretary may approve for the regulation of current mining and related reclamation activities. See 30 U.S.C. 1291(11) and (25), 1253.

Although Section 523(a) states that the Act shall not apply to Indian lands (except as provided in 30 U.S.C. 1300), Subchapter IV, which governs the reclamation of mining areas that were abandoned prior to the August 3, 1977 effective date of the Act, by its terms *does* apply to Indian lands. Section 401 of the Act, 30 U.S.C. 1231, establishes an "Abandoned Mine Reclamation Fund" to be administered by the Secretary of the Interior. The Fund is to be used, inter alia, for the reclamation and restoration of land and water resources that were harmed by past mining activities. 30 U.S.C. 1231(c). Money in the Fund is derived primarily from a reclamation fee imposed on operators of active coal mines. 30 U.S.C. 1231; 30 C.F.R. 872.11(a).

Section 402(g) of the Act, 30 U.S.C. 1232(g), addresses the allocation of money in the Fund. Under Subsection 402(g)(1), "[t]he geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds." Section 402(g)(2) then provides in pertinent part:

> Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned

> mine reclamation program to accomplish the purposes of this subchapter.

Section 405(k), 30 U.S.C. 1235(k), further states that Indian tribes that have "within their jurisdiction" either abandoned lands eligible for reclamation or lands from which coal is currently being produced "shall be considered as a 'State' " for the purposes of the abandoned mine reclamation program under Subchapter IV.

b. As part of the comprehensive regulations promulgated in 1978 to implement the abandoned mine reclamation program under Subchapter IV of the Surface Mining Act, the Secretary issued regulations for the allocation of reclamation fees from the Fund. 43 Fed. Reg. 49932, 49941 (1978). Under 30 C.F.R. 872.11(b)(2), 50% of the reclamation fees collected within a state shall be allocated to that state for use in connection with an approved state reclamation plan. However, this regulation further provides that "[r]eclamation fees collected from Indian lands shall not be included in the calculation of amounts to be allocated to a State."

Similarly, 30 C.F.R. 872.11(b)(3) provides that 50% of the reclamation fees collected from "Indian lands" shall be allocated to the Indian tribe having an interest in those lands for use by that tribe under an approved Indian reclamation program. However, the Secretary consistently has construed the Act not to permit the approval of a *reclamation* plan submitted by an entity if that entity does not also have an approved *regulatory* program under Subchapter V. Pet. App. 4a; 47 Fed. Reg. 28580 (1982); see 30 U.S.C. 1235(b) and (h). Because Indian tribes are not eligible to submit plans for the regulation of current mining activities on Indian lands, the money al-

located to a tribe under 30 C.F.R. 872.11(b)(3) is not actually paid to the tribe. Although the State of Montana participated in the rulemaking proceedings in 1978, it did not challenge the regulations governing the allocation of reclamation fees (Pet. App. 7a). Under 30 U.S.C. 1276(a)(1), any judicial challenge to those regulations was barred after the passage of 60 days.

3. a. On December 11, 1981, the Secretary issued proposed rules governing the strip mining program (46 Fed. Reg. 60778), and on June 30, 1982, those regulations were promulgated in final form. 47 Fed. Reg. 28574 (1982). The regulations contained the two provisions governing the allocation of reclamation fees to states and Indian tribes in the same form in which they had been promulgated in 1978. 46 Fed. Reg. 60782, 60790 (1981); 47 Fed. Reg. 28580, 28592, 28596 (1982).

This time, however, the State of Montana sought judicial review of 30 C.F.R. 872.11(b)(3), which provides for the allocation to Indian tribes of reclamation fees collected from lands in which they have an interest. Pet. App. 8a. Montana argued that because 30 U.S.C. 1232(g)(2) provides that 50% of the reclamation fees "collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation," the regulation should have allocated to Indian tribes only reclamation fees collected from within the exterior political boundaries of an Indian reservation, not fees from other "Indian lands" that lie outside those boundaries.[2] Montana did not, however, challenge 30 C.F.R. 872.11(b)(2),

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[2] Although the State of New Mexico objected to the regulation on similar grounds during the administrative proceedings (Pet. App. 8a), it did not join Montana in this judicial challenge.

which requires the exclusion from the allocation to a state of any reclamation fees collected from "Indian lands" within that state. Pet. App. 18a.

The district court granted summary judgment for the Secretary (Pet. App. 28a-36a). The district court first concluded that because 30 C.F.R. 872.11(b)(3) was repromulgated in 1982 in the identical form in which it was promulgated in 1978, Montana now is barred from challenging the regulation because it did not seek judicial review of that regulation within 60 days of the date on which it was first promulgated in 1978. The court rested this conclusion on 30 U.S.C. 1276(a)(1), which requires that any challenge to regulations be brought within 60 days. Pet App. 30a-33a. The district court also sustained the regulation on the merits. *Id.* at 33a-36a. It reasoned that "'[t]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.'" Pet. App. 35a-36a, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

b. The court of appeals affirmed (Pet. App. 1a-27a). It disagreed with the district court's conclusion that Montana's challenge to the regulation is entirely foreclosed by virtue of Montana's failure to challenge the regulation in 1978. The court of appeals concluded that because, in its view, "an agency decision not to amend longstanding rules after a notice and comment period is reviewable agency action" (Pet. App. 8a), the Secretary's repromulgation of the regulation in 1982 was new agency action subject to judicial review within 60 days pursuant to 30 U.S.C. 1276(a)(1). Pet. App. 7a-10a.

However, on the merits, the court of appeals agreed with the district court. It noted the "initial appeal"

of the State's reliance on the use of the words "Indian reservation" in 30 U.S.C. 1232(g)(2) as a basis for arguing that reclamation fees should not be allocated to an Indian tribe from all Indian lands (Pet. App. 15a). But on more careful examination of the statute as a whole, including several other provisions that it found to be facially inconsistent with such an interpretation, the court of appeals rejected the State's argument based on the supposedly "plain meaning" of 30 U.S.C. 1232(g)(2) standing alone (Pet. App. 14a-19a). After a detailed study of the legislative history (*id.* at 19a-26a), the court of appeals concluded (*id.* at 24a):

> In sum, examination of the 95th Congress' deliberations, no more than those of earlier Congresses, yields not even a hint that the choice of the phrase "Indian reservation" in Section 1232(g)(2) reflected a conscious decision to treat on- and off-reservation lands differently. Indeed, indiscriminate use of the phrases "Indian lands" and "Indian reservations" throughout the long history of the Act suggests an inadvertent drafting inconsistency far more than a deliberate policy choice. * * * Rather than indicating a finely tuned calibration designed to differentiate among the various kinds of Indian lands, the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which Indians have an interest.

ARGUMENT

The court of appeals correctly rejected Montana's belated challenge to a regulation concerning the allocation of reclamation fees that was first adopted by the Secretary in 1978 and that Montana did not challenge at that time. Congress decided in 1977 not to give the states jurisdiction to regulate current mining and related reclamation activities on Indian lands such as the ceded strip, choosing instead to postpone that question for resolution in subsequent legislation. The Secretary has simply determined that reclamation fees from Indian lands likewise should not be allocated to the states. The ruling below on this narrow question concerning the reasonableness of the Secretary's implementation of the relevant statutory provisions does not conflict with any decision of this Court or of another court of appeals, and it presents no issues of broad importance warranting review by this Court.

1. As an initial matter, we note that Montana sought judicial review only of one of the two regulations that allocate reclamation fees. The regulation the State has challenged, 30 C.F.R. 872.11(b)(3), provides that 50% of the reclamation fees collected from "Indian lands" are to be allocated to the Indian tribe having an interest in those lands. However, even if the State were correct that this regulation is invalid to the extent it allocates to the Indian tribe fees collected from Indian lands located outside the exterior boundaries of the tribe's reservation, that invalidation would not automatically increase the *State's* allocated share.

A separate regulation, 30 C.F.R. 872.11(b)(2), determines the allocation that Montana itself is entitled to receive. Section 872.11(b)(2) provides that

50% of the reclamation fees collected within a state are to be allocated to that state, but it expressly excludes fees collected from "Indian lands" in calculating that amount. Montana did not challenge the exclusion in 30 C.F.R. 872.11(b)(2) of fees collected from "Indian lands." Because that exclusion would remain in effect even if this Court were to grant review and hold that 50% of the fees collected from Indian lands outside of an Indian reservation should not be allocated to the tribe concerned, the 50% share of reclamation fees collected from the ceded strip would not be reallocated to Montana. Instead, under the governing regulations, the ceded strip fees no longer allocated to the Crow Tribe would become available to the Secretary, in his discretion, for expenditure anywhere in the Nation to meet the purposes of the Act. 30 C.F.R. 872.11(b)(5); 30 U.S.C. 1231(c), 1232(g)(3).[3] Thus, contrary to the State's suggestion (Pet. 8, 14), even if this Court were to invalidate the regulation Montana challenges, the result would not be an automatic increase in the amount of funds available to the State.[4] All else aside, this

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[3] Under the Act and implementing regulations, whatever reclamation fees are *not* allocated to a state or Indian tribe (*e.g.*, the 50% share that is not routinely allocated to the state or tribe in the first instance) are pooled on a nationwide basis. A portion of those fees is administratively allocated to certain purposes, and the remainder is available for expenditure by the Secretary, in his discretion, to meet particular reclamation needs in any eligible area. 30 U.S.C. 1232(g)(3); 30 C.F.R. 872.11(b)(1), (4) and (5).

[4] The Act and implementing regulations provide that any money allocated to a state or Indian tribe that has not actually been ~~granted to~~ spent by the state or tribe within 3 years shall then be available to the Secretary as part of the nationwide pool of un-

absence of any direct and immediate financial consequences for the State counsels against review by this Court.

2 a. In any event, the district court and court of appeals correctly rejected Montana's challenge to the regulation that allocates to the tribe concerned the fees collected from Indian lands. The regulation, 30 C.F.R. 872.11(b)(3), was first promulgated in 1978, as part of the original set of comprehensive regulations to implement the 1977 Act. Under this Court's decisions, that contemporaneous interpretation of the Act by the agency charged with its implementation is entitled to particular deference. See, *e.g.*, *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, No. 84-262 (June 10, 1985), slip op. 15-16; *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

However, more than judicially fashioned principles of statutory construction require deference to this

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allocated fees. 30 U.S.C. 1232(g)(2); 30 C.F.R. 872.11(b)(2) and (3). As explained above (see page 6, *supra*), the Secretary has not approved any abandoned mine reclamation plans submitted by Indian tribes, because tribes do not have authority to regulate current mining activities on Indian lands. As a result, the funds that are allocated to Indian tribes cannot actually be granted to the tribes, and they accordingly are retained in the general pool. The Department of the Interior has not construed the Act or regulations to begin the running of the three-year period for the expenditure of funds until the state or Indian tribe has actually been granted money under an approved plan. The three-year period therefore has not yet begun to run with respect to fees derived from the ceded strip.

contemporaneous implementation of the Act. Montana failed to seek judicial review of the regulation when it was promulgated in 1978, and any judicial challenge to the original regulation was barred after the passage of the 60-day period for judicial review allowed by 30 U.S.C. 1276(a)(1). The court of appeals held that the State's current judicial challenge to the regulation is not time barred only because the Secretary repromulgated it in 1982. See Pet. App. 7a-10a. Even assuming that the court of appeals was correct that judicial review of the administrative interpretation embodied in 30 C.F.R. 872.11(b)(3) is not *entirely* foreclosed at the present time, a court must be extremely reluctant to overturn the Secretary's decision not to alter a regulation that was included in the original implementing regulations and was not challenged at that time.

The obvious purpose of the 60-day time limit Congress imposed on the bringing of a suit to challenge regulations implementing the complex Surface Mining Act was to accord finality to the Secretary's interpretation and implementation of the Act. In this case, Montana has not pointed to any new evidence of legislative intent that was not available when the regulation first was promulgated in 1978 and that should now unsettle the finality of the Secretary's original interpretation. The State is simply revisiting a question that was previously decided by the Secretary. Only the most compelling indications that the Secretary was wrong would warrant setting aside the administrative interpretation at this late date, especially since Congress reserved to itself the ultimate resolution of matters pertaining to Indian lands when it enacted the Surface Mining Act in 1977. Montana has offered no such compelling indi-

cations. To the contrary, the Secretary's method of allocation reflected in 30 C.F.R. 872.11(b)(3) remains entirely reasonable.

b. As we have explained above (see pages 4-5, *supra*), Congress has unambiguously barred the states from assuming any direct role in the regulation of current mining activity on Indian lands, at least until Congress has enacted additional legislation addressing that subject. Under the statutory scheme, Montana does not have independent authority to regulate the current mining of tribally owned coal on the ceded strip.[5] It would be anomalous for Congress to

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[5] The State of Montana has disputed the Secretary's position that it does not have authority to regulate the mining of the Crow Tribe's coal on the ceded strip, and it has purported to apply the pertinent provisions of Montana law to that mining. Montana accordingly brought a separate suit to challenge other sections of the Secretary's regulations (30 C.F.R. Pt. 750 (establishing the Federal Program for Indian Lands)) insofar as they provide for direct enforcement of the Act by the Secretary on the ceded strip. On August 12, 1985, the Secretary and the State of Montana entered into a Memorandum of Understanding in settlement of that litigation. See *Montana* v. *Hodel*, Civ. Action No. 84-3584 (D.D.C. Aug. 12, 1985).

The Memorandum of Understanding provides for the application of the more stringent of either the federal or state standards, and assigns to the State the administrative responsibility for inspection and enforcement in the first instance. However, the Memorandum of Understanding expressly does *not* purport to resolve the question whether lands within the ceded strip are "Indian lands," as defined in 30 U.S.C. 1291(9), for purposes of the Act; whether the federal program for regulation of current mining activities on Indian lands applies to the ceded strip; or whether Montana may apply its state program to the ceded strip. See Art. XV(c).

The Memorandum of Understanding also expressly states that it does *not* affect the question of entitlement to reclama-

have intended that Montana nevertheless is entitled to receive 50% of the reclamation fees imposed on that same mining activity. The State has not pointed to anything in the legislative history to support that result. Nor is that result compelled by the text of the Act, as the State maintains.

Under 30 U.S.C. 1232(g)(2), the section of the Act upon which the State exclusively relies, 50% of the reclamation fees collected "in any State or Indian reservation" shall be allocated to that State or Indian reservation. Even if the State were correct that the ceded strip is not embraced within the term "Indian reservation," it does not follow that the ceded strip therefore is within the "State," as the quoted term is used in the Act, and that 50% of the fees derived from the ceded strip therefore must be reallocated to Montana. As we previously have noted, 30 U.S.C. 1291(11) specifically excludes "Indian lands" from the term "lands within any State" for purposes of the Act. In light of this definition, the term "State" as used in 30 U.S.C. 1232(g)(2) reasonably can be construed in a similar manner to exclude "Indian lands" for purposes of allocating fees to a state.

By the same token, there is nothing on the face of 30 U.S.C. 1232(g)(2) that prohibits the allocation of reclamation fees from the ceded strip to the Crow Tribe. Section 1232(g)(2) establishes a *minimum* amount of money to be allocated to states and Indian tribes. Accordingly, even if the term "Indian reser-

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tion fees collected from mining activities on the ceded strip. Art. XV(a). It therefore does not affect the validity of 30 C.F.R. 872.11(b)(3) insofar as it administratively allocates these fees to the Crow Tribe.

We have lodged a copy of the Memorandum of Understanding with the Clerk of this Court.

vation" as used in that section is read in a narrow, technical sense to exclude coal-bearing lands held by the United States in trust for a tribe but located outside the political boundaries of its reservation, it does not follow that the Secretary would be prohibited from allocating funds to the Indian tribe in addition to 50% of the fees derived from within the political boundaries—namely, the fees that are collected on the tribe's "Indian lands" outside of those boundaries. Thus, even accepting the State's interpretation of the term "Indian reservation," the regulation the State challenges is valid.

c. In any event, it was entirely reasonable for the Secretary to conclude that Congress did not intend to use the term "Indian reservation" in its narrowest sense when it enacted 30 U.S.C. 1232(g)(2), and therefore to conclude that the tribe concerned rather than the state should be allocated the reclamation fees from an area, such as the ceded strip, in which an Indian tribe owns the coal. Congress's manifest intent to exclude the states from assuming any role under Subchapter V with regard to current mining activities on such lands in itself is a persuasive indication of such congressional intent. In this respect, 30 U.S.C. 1232(g)(1) specifically provides that the geographic allocation of expenditures is to reflect "the area from which the revenue was derived"; this language suggests that it is reasonable for the Secretary to take into account the Indian character of the area from which fees in the ceded strip are derived in providing for the allocation of those funds.

Moreover, as the State concedes (Pet. 12 n.9), in order for a state to be entitled to receive *any* reclamation fees under Subchapter IV, it must have an approved program for the regulation of current mining

and related reclamation activities under Subchapter V. 30 U.S.C. 1235(c), 1253. Such a state program under Subchapter V is expressly limited to "lands within such State" (30 U.S.C. 1291(25)), a term that excludes "Indian lands" (30 U.S.C. 1291(11)). Because Congress directly linked the state's abandoned mine reclamation program to its current regulatory program in this manner, it was reasonable for the Secretary to conclude that Congress intended to allocate fees to the state for expenditure under its abandoned mine reclamation program in a manner that likewise excludes Indian lands. As a result, the Secretary reasonably construed Section 1232(g)(2) to give effect to that intent by including within the term "Indian reservation" all Indian lands that are excluded from the state's jurisdiction.

There is still other statutory language that reinforces this conclusion. Under 30 U.S.C. 1235(k), "Indian tribes having within their jurisdiction * * * lands * * * from which coal is produced" are considered as a "State" for purposes of Subchapter IV. The coal-producing lands in the ceded strip—in which the Crow Tribe retained its beneficial interest between 1904 and 1958 and which were restored to full tribal ownership in 1958—surely can be regarded as "within the[] jurisdiction" of the Crow Tribe for purposes of 30 U.S.C. 1235(k). Accordingly, the Crow Tribe, like Montana, is a "State" for purposes of Subchapter IV. Under the statutory formula, 50% of the fees collected in that "State" (*i.e.*, within the Tribe's jurisdiction on the ceded strip) are to be allocated to that "State" (*i.e.*, to the Tribe). As the court of appeals concluded (Pet. App. 16a-17a), this provision reinforces the reasonableness of construing 30 U.S.C. 1232(g)(2) as a whole to contemplate alloca-

tion of reclamation fees from Indian lands to the tribe concerned, and therefore of construing the term "Indian reservation" to include all such Indian lands.

The reasonableness of this interpretation is confirmed by the court of appeals' review of the legislative history (see Pet. App. 20a-25a), which generally reflects an absence of any differentiation by Congress between Indian lands within the political boundaries of a reservation and such lands outside those boundaries. The Senate Report on the 1977 Act, for example, states that "[f]ifty percent of the revenues derived from * * * *lands of an Indian tribe* are to be returned to that * * * Indian tribe." S. Rep. 95-128, 95th Cong., 1st Sess. 67 (1977) (emphasis added). This committee report language directly supports the challenged regulation. And application of that regulation to the ceded strip is particularly appropriate, because the ceded strip is immediately adjacent to the Crow Reservation and was originally within the political boundaries of that Reservation. Thus, this case does not involve the application of 30 C.F.R. 872.11(b)(3) to a wholly separate and newly acquired tract that lacks any substantial nexus to a tribe's historic reservation.

Contrary to the State's contention (Pet. 9-11), the Secretary's implementation of Section 1232(g)(2) in this manner is not inconsistent with the Court's decision in *Escondido Mutual Water Co.* v. *LaJolla Band of Mission Indians*, No. 82-2056 (May 15, 1984). There the Court considered the meaning of the term "reservation" in Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), and concluded that it did not extend to water rights of the tribes involved. Slip op. 14-18. But the Court noted that the statutory definition of the term "reservation"

even in the Federal Power Act includes "lands and interests in lands owned by the United States" (slip op. 15 & n.24, quoting 16 U.S.C. 796(2)). Here, of course, the mineral rights in the coal-producing lands in the ceded strip are interests in land owned by the United States for the benefit of the Crow Tribe. Moreover, in this case, a number of provisions of the Surface Mining Act make clear Congress's intent to exclude the states from assuming a role even with respect to Indian lands that are located outside the formal political boundaries of an Indian reservation. These unique statutory provisions of course were absent in *Escondido*.

d. Finally, even if Montana were correct that only fees derived from an "Indian reservation" in the narrowest sense may be allocated to an Indian tribe, the regulation it challenges nevertheless is valid as applied to the Crow Tribe's coal in the ceded strip. As we have explained above (see pages 2-3, *supra*), in the Act of May 19, 1958, Congress restored to full tribal ownership all "vacant and undisposed-of ceded lands" on the Crow Reservation. The District Court for the District of Montana recently held, in conformity with the Secretary's longstanding position, that the quoted phrase restored to tribal ownership not only surface lands in the ceded strip, but undisposed-of subsurface mineral interests as well. *Crow Tribe* v. *Montana*, slip op. 5-10. Significantly, Section 2 of the 1958 Act provides that the lands affected "are hereby added to and made a part of the existing reservations for such tribe or tribes." If the mineral rights were restored to the Crow Tribe pursuant to Section 1 of the 1958 Act, then those mineral rights also were added to the then-existing Crow Reservation pursuant to Section 2 of the same

Act. But *see Crow Tribe* v. *Montana*, *supra*, slip op. 43. Accordingly, those mineral rights are part of an "Indian reservation" for purposes of the allocation of reclamation fees under 30 U.S.C. 1232(g)(2).[6]

We do not suggest that the surface area of these coal-producing lands in which the Tribe owns only the subsurface mineral rights were included within the political boundaries of the Crow Reservation, such that the State does not have jurisdiction and the Tribe does have jurisdiction over activities occurring on the surface generally. See *Little Light* v. *Crist*, 649 F.2d 682, 685 (9th Cir. 1981); cf. *Crow Tribe* v. *Montana*, *supra*, 650 F.2d at 1107; *Crow Tribe* v. *Montana*, *supra*, slip op. 43. But at least for purposes of the allocation of fees collected from the mining of coal on the ceded strip, which was made part of the "reservation" by the 1958 Act, the reference in 30 U.S.C. 1232(g)(2) to an "Indian reservation" must be understood to include the coal deposits in the ceded strip that are held by the United States in trust for the Crow Tribe.

3. Contrary to the State's assertion (Pet. 14), the regulation it challenges does not render the ceded strip a "regulatory no-man's land" with respect to reclamation of abandoned mines. If any such reclamation work needs to be done, the Secretary may spend money for that purpose from the unallocated portion of the reclamation fees that are available for use, in his discretion, in any eligible area. See note 3, *supra*. Moreover, the Secretary has established an interim program for such reclamation activities on Indian lands, pending the resolution by Congress of the broader jurisdictional questions involving such

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[6] The court of appeals did not reach this question. See Pet. App. 6a n.5.

lands that is contemplated by 30 U.S.C. 1300. See 30 C.F.R. Pt. 888. In light of the Memorandum of Understanding between the Secretary and the State concerning regulation of current mining activities on the ceded strip (see note 5, *supra*), it seems likely that cooperative measures could be taken as well with respect to any reclamation activities concerning abandoned mining areas, if any, on the ceded strip.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

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